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In The

Supreme Court of the United States

SENEL TAYLOR, *et al.*,

Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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SUMMARY OF ARGUMENT

The Cleveland Pilot Scholarship Program has thrown an educational lifeline to approximately 4,000 of Ohio's neediest students, previously consigned to the worst public schools in the state of Ohio, and possibly the Nation. At the behest of respondents, the Sixth Circuit proposes to cut that lifeline and return the children to those schools. Petitioners in their opening briefs have shown the many flaws in the Sixth Circuit's decision below. Rather than respond directly to petitioners' arguments, however, both sets of respondents seek refuge in erroneous and unfounded factual assertions having no basis in the record and in inappropriate and misleading theoretical constructions bearing no relation to the actual case.

Although each respondent takes a very different tack, they share one critical common point: they disparage the extent to which the Cleveland Program is a true parental choice program, which is the lodestar of this Court's recent jurisprudence. Both respondent briefs are pervaded with an effort to persuade this Court to ignore the genuine and independent choices that the Program allows the participating parents to make in favor of a distorted view of the Program as one of direct aid to religious schools.

Respondents either ignore or distort a whole series of cases in which this Court has held that parental choice is a critical factor in determining whether the parents may use governmental aid in educating their children in religious schools. As the Supreme Court of Vermont observed in overruling a 1961 decision holding that the Establishment Clause prohibited parents from selecting religious schools for their children under Vermont's

tuitioning program,[1] this Court's establishment Clause jurisprudence has "evolved greatly." *Campbell v. Manchester Board of School Directors*, 161 Vt. 441, 448 (1994). In particular, the court noted that the difference between *Lemon*-era[2] First Amendment cases and the more recent ones lay in the "weight given to the intervention of parental choice." *Campbell*, 161 Vt. at 455. Respondents utterly fail to acknowledge this jurisprudential evolution and the greater weight this Court's cases have accorded parental choice since *Mueller v. Allen*, 463 U.S. 388 (1983). Consequently, they either ignore or distort a series of cases in which this Court has held that parental choice is a critical factor in determining whether parents may use government aid in educating their children in religious schools.

While this Court's initial modern decisions under the Establishment Clause recognized the twin principles of religious neutrality and parental choice, see *Everson v. Board of Education*, 330 U.S. 1 (1947), and *Board of Education v. Allen*, 392 U.S. 236 (1968), in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), and *Sloan v. Lemon*, 413 U.S. 825 (1973), this Court deviated from those earlier decisions and downplayed the importance of parental choice in programs that the Court regarded as

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[1] Both Vermont and Maine allow local school districts to pay tuition to the high schools of the resident families' choice in lieu of maintaining a public high school. Under this option, all children attend the schools their parents select, either private schools or public schools operated by other school districts. *Campbell* overruled *Swart v. South Burlington Sch. Dist.*, 122 Vt. 177 (1961), which was consistent with respondents' understanding of the Establishment Clause.

[2] *Lemon v. Kurtzman*, 403 U.S. 602 (1973).

intended to support religious education. Respondents persistently ignore the differences between *Nyquist* and *Sloan* and the Cleveland Scholarship Program,[3] and fail miserably in their efforts to render this Court's *Mueller* line of cases inapplicable.

Respondents' approach to the Establishment Clause puts it in direct conflict with the Free Exercise Clause, as well as the Free Speech and Equal Protection Clauses. These coequal constitutional commands must be reconciled and harmonized, yet respondents' theories turn the Establishment Clause into an engine for discrimination against religious schools and those who would choose them. Far from preventing an advancement of religion,

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[3] Both *Nyquist* and *Sloan*, in finding that the programs at issue have the effect of advancing religion, are riddled with language indicating that the Court viewed the respective legislatures as intending precisely that result. As noted in *Mueller v. Allen*, 463 U.S. at 394, this Court is "reluctan[t] to attribute unconstitutional motives to the States" and thus rarely finds a secular purpose lacking under the first prong of the *Lemon* test. We have argued that one of the many ways *Nyquist* and *Sloan* can be distinguished from the present case is that there is no evidence that the Program's facial religious neutrality camouflages a similar intent to advance religion. The Simmons-Harris respondents seek to answer this claim by asserting that the *Nyquist* Court merely meant that the Legislature intended the foreseeable consequences of the program they enacted. Br. at 20 n.5. But no honest reading of *Nyquist* can ignore the Court's many references to the purpose of the program as one of aiding religion (see, *e. g.*, *Nyquist*, 413 U.S. at 756, "the purpose and inevitable effect of the benefits are to aid and advance those religious institutions"), and the Court's conclusion that it was addressing one of "the ingenious plans for channeling state aid to sectarian schools that periodically reach this Court." *Id.* at 785.

respondents would place religion at a disadvantage, permitting programs where parents are empowered to select non-religious private schools but prohibited from choosing religious ones. The Establishment Clause does not require this – nay, it does not permit such discrimination.[4]

The Ohio Legislature made the judgment that children trapped in Cleveland's public schools should have the alternative of choosing from a range of educational options – including private schools – if their parents so desire. Not one scintilla of evidence has been introduced that the Legislature enacted the program in an effort or with the desired consequence to advance religion, nor have respondents ever attempted to prove that. Instead, they have relied on this Court's decision in *Nyquist* as their primary support, and its conclusion that the programs there had a primary effect of advancing religion. While we believe that *Nyquist* is readily distinguishable, we recognize that *Nyquist*'s reference to the proportions of religious schools participating in the program is both inconsistent with subsequent pronouncements of this Court and can lead to constitutionally pernicious results. Although we believe firmly that the Scholarship Program accords with the rule of law upon which *Nyquist* was

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[4] We note that the much-maligned *Lemon* test requires that a statute have a principal or primary effect "that neither advances *nor inhibits* religion." *Lemon*, 403 U.S. at 612 (emphasis added). This prong thus contains a command of religious neutrality; and just as this Court indicated in *Everson* that the religion clauses would be offended by an exclusion of religious school pupils from transportation subsidies, 330 U.S. at 18 ("State power is no more to be used so as to handicap religions than it is to favor them."), so here would the Sixth Circuit's decision inhibit religion by putting those who would choose a religious school for their children at a concrete disadvantage.

decided, petitioners request that it be overruled, if that is what this Court finds necessary to protect the rights of the Cleveland families to select a private school for their children. The inconsistency of *Nyquist* with subsequent precedents and its use as a means of inhibiting religion in general represent "special justification" more than sufficient enough to justify a departure from *stare decisis*. *Dickerson v. United States*, 530 U.S. 428 (2000). Indeed, fidelity to the rules carefully articulated in the many cases since *Nyquist*, and relied upon by the State of Ohio in crafting this program of educational equity, may require it.

ARGUMENT

I. RESPONDENTS IGNORE THAT THE CLEVELAND PROGRAM IS A TRUE PARENTAL CHOICE PROGRAM.

The Simmons-Harris respondents begin their argument with a quotation from *Witters v. Washington State Dep't of Services for the Blind*, 474 U.S. 481, 489 (1986), that "aid to a religious institution unrestricted in its potential uses, if properly attributable to the state, is clearly prohibited by the Establishment Clause." Br. at 6. Similarly, the Gatton respondents begin their argument with the statement that "[t]he substantial and wholly unrestricted grants of state funds to Cleveland religious schools, which have a primary purpose of teaching and promoting religious doctrine, violate a fundamental prohibition of the Establishment Clause." Br. at 5. Unable to assail the Program in its actual design, both respondents transform it into something it emphatically is not, namely, a system of "direct grants to the [religious] schools." *Id.* This argument's primary flaw is, of course, that whatever else may

be true of the program, it is in no way a program of grants to the schools. The respondents engage in a great deal of smoke and mirrors to obscure the fundamental fact that the direct beneficiaries of the Program are the families receiving the scholarships – not the schools in which they enroll their children.

It is important for the Court to keep in mind several distinctions. First, the Court must recognize that the nature of the "aid" involved is important, because that determines who the direct beneficiaries are. Second, the Court must distinguish between the method of transmitting the aid and who the beneficiaries are. These are separate and distinct inquiries that respondents do their best to obscure.

Respondents would like this Court to believe that the Cleveland Program is one providing institutional aid to the religious schools that participate in the program,[5] similar to those addressed in *Tilton v. Richardson*, 403 U.S. 672 (1971), and *Roemer v. Maryland Public Works Board*, 426 U.S. 736 (1976). In such programs grants are given to institutions to further their purposes directly, and while the aid may indirectly aid the individuals enrolling in such institutions, it is the institution *qua* institution that primarily benefits. This is true even where the aid, as in *Roemer*, is given to the institution on a per capita basis, because the institution has an entitlement to the funds,

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[5] The Gatton respondents simply assume this as a given, and patronizingly view the role of the parents as mere conduits for the aid to the schools. The Simmons-Harris respondents make a more nuanced and sophisticated version of the same argument, treating the aid to the parents as equivalent to per capita aid to the school, a form of institutional aid. Both approaches mischaracterize the aid.

rather than accepting them in exchange for an obligation to educate specific students who have directed their funds to the schools. See also *Columbia Union College v. Oliver*, 159 F.3d 151, 159 (4th Cir. 1998) (addressing the same program as *Roemer* and finding it to be institutional aid). These institutional aid programs stand in contrast to individual assistance programs such as educational programs assisting individual students, where it is the students who are the direct beneficiaries of the assistance and who decide at which institution to use their benefits. In such programs, students use the funds to procure an education, exchanging them with an institution for educational services. Any benefit to the institution in such a program is properly characterized as indirect, attenuated, and incidental to the benefit conferred on the student.

Contrary to respondents' assertions, the Cleveland Program is clearly *not* an institutional aid program and just as clearly *is* a program providing tuition assistance to the children directly. The schools selected by the families are better off only in the most attenuated of senses since they have to provide an education to the scholarship recipients in exchange for the tuition. The schools receive the indirect benefit of more families being able to avail themselves of their services, but this is a far cry from institutional assistance that would directly benefit their program as a whole.[6]

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[6] Federal civil rights laws, for example, distinguish between procurement contracts to which they do not apply and "federal financial assistance" programs to which they do. *Cook v. Budget Rent-A-Car*, 502 F. Supp. 494 (S.D.N.Y. 1980).

Because the Cleveland Program is a student-assistance and not a school-assistance program, it is not subject to this Court's decisions prohibiting unrestricted aid to religious schools, such as *Tilton v. Richardson*. The aid is obviously restricted in the sense that the beneficiaries, the students' families, can only use the funds for tuition to the schools they select, but this Court's decisions do not prohibit them from selecting an education from a religious school. See *Mueller; Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986), and *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993). Crucially, not one penny of public funds flows to a religious school unless a parent decides to apply for the Program and selects that school.

The second distinction we ask this Court to bear in mind is the difference between the mode of transmission of whatever aid is involved and the beneficiaries of the aid. The actual funds in indirect student-assistance programs are rarely transmitted directly to the beneficiaries, but rather are sent to the institutions where the students choose to procure their education.[7] Because institutional aid also is usually but not always transmitted directly to

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[7] The federal Pell Grant and Guaranteed Student Loan programs, 20 U.S.C. 1070, *et seq.*, and 1070a, *et seq.*, are classic student assistance programs, and like the G.I. Bill, 38 U.S.C. 3451, *et seq.*, place no restrictions involving religion on the schools the students may choose. This Court has twice upheld the participation of religious schools in this sort of unrestricted aid program. *Durham v. McLeod*, 259 S.C. 409, 192 S.E.2d 202 (1972), *appeal dismissed for want of a substantial federal question*, 422 U.S. 332 (1973); *Americans United v. Blanton*, 433 F. Supp. 97 (M.D. Tenn. 1977), *affirmed without opinion*, 434 U.S. 803 (1977). It is noteworthy that the appeal in *Durham* was dismissed the same Term *Nyquist* was decided.

the institution, it is easy to confuse the transmittal of student aid to an institution with institutional aid to the institution. Virtually all Pell Grant and Guaranteed Student Loan monies are sent directly by the colleges the beneficiaries attend, for the obvious reason that the government wants to be sure that the beneficiaries spend the money on the intended purpose, the procurement of an education. See *Grove City College v. Bell*, 465 U.S. 555 (1984). For similar reasons, occasionally the government does not send institutional aid directly to an institutional beneficiary, such as in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), where the university sent student organizations' publication subsidies directly to the printers to ensure the organizations did not use the funds for purposes other than printing. No one believes that just because the printers received the subsidy that they rather than the organizations were the beneficiaries of the subsidies. Similarly, just because in the Cleveland Program the tuition scholarship proceeds are sent to the parents via the schools to be signed over to the schools in payment of tuition owed does not make the schools rather than the students the beneficiaries of the Program. The aid is transmitted to the school on behalf of the children, the beneficiaries of the program.[8] Accordingly, the scholarship Program is a "true private-choice program," see *Mitchell v. Helms*, 530 U.S.

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[8] The requirement that parents endorse the checks over to the schools simply highlights that the families are the beneficiaries; there is no constitutional requirement that the actual beneficiaries ever take physical possession of aid in order to "receive" it. It is the substance and not the form that is dispositive.

793, 842 (2000) (O'Connor, J., concurring in the judgment), of the type sustained in *Mueller*, *Witters*, and *Zobrest*.

II. THE PROGRAM IS RELIGIOUSLY-NEUTRAL AND MEETS THE STANDARDS THIS COURT HAS SET FOR THE ESTABLISHMENT CLAUSE.

The Sixth Circuit and respondents assert that the Cleveland Program fails to meet this Court's Establishment Clause requirements because it has the effect of advancing religion. Their primary evidence for this conclusion is that at the time the record in this case was formed, 82 percent of the participating schools were religious and 96 percent of the children receiving scholarships were enrolled in those religious schools. They then seek to link these proportions to the structure of the Program, and argue that the structure skews the Program in favor of religious schools. These proportions are quite similar to those present in *Committee for Public Education v. Nyquist* (but also *Mueller* and *Agostini v. Felton*, 521 U.S. 203 (1997)), in which this Court addressed a three-part program that included both a tuition grant component and a tax deduction component.

Petitioners showed in our opening briefs the considerable factual differences between the *Nyquist* program and the Cleveland Program. In addition, we noted several developments post-*Nyquist* that undercut its rationale. Respondents seek unsuccessfully to rebut these efforts by distorting our arguments, by distorting the facts of the case, and by distorting this Court's post-*Nyquist* precedents.

Simply put, respondents' argument is that too many religious schools are participating in the Program and too many parents are choosing to send their children to those

schools. Respondents offer no hint of what an "acceptable" proportion of religious schools would be nor how many families could be permitted to choose such schools.[9] Certainly they offer no constitutional way of controlling parental choice of religious schools, short of

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[9] In an effort to turn at least one post-*Nyquist* decision to their advantage, the Simmons-Harris respondents argue that this Court's 1986 decision in *Witters* supports their analysis and that when combined with *Nyquist* signifies that there is a continuum of possible programs ranging from unconstitutional programs like *Nyquist* and *Sloan* where there are few non-religious options to choose from to constitutional programs like *Witters* where there are many. (By contrast, the Gatton respondents, recognizing that *Witters* offers them no comfort, dismiss it as "so thoroughly distinguishable as to lack any persuasive force for present purposes." Br. at 25.) Unfortunately for respondents' argument, this Court has rejected precisely this approach in *Mueller v. Allen*, 463 U.S. at 401, saying,

> We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated.

See also *Agostini*, 521 U.S. at 229 ("Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid"). Any ambiguity in the meaning of *Nyquist* and *Witters* in this regard is removed by the admonition of Justice Powell, the author of *Nyquist*, that "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate" the primary effects test. *Witters*, 474 U.S. at 487 (Powell, J., concurring). Four Justices either joined Justice Powell, or agreed in separate concurrences, see *id.* at 490 (White, J., concurring), and *id.* at 493 (O'Connor, J., concurring).

precluding it altogether. Rather they appear to rely on the idea that because religious schools currently predominate in Cleveland's private school marketplace, they always will, and thus the Program could never be constitutional. The Simmons-Harris respondents proclaim that "the predominance of sectarian schools is an inherently stable aspect of the Program", Br. at 19 n.4. They also assert that this is due to the predominance of sectarian schools in the Cleveland private school universe, and that this is true in virtually all other jurisdictions in the United States. *Id.* at 2. The Gatton respondents make a roughly similar argument, to the effect that "direct financial aid like that given in Cleveland to sectarian schools would fairly be called substantial and would violate the Establishment Clause." Br. at 41. They also note that sectarian schools generally comprise about 80 percent of all private schools in the United States. *Id.* at 41 n.9.

Setting aside the Gatton respondents' totally unsupported and erroneous assertion that the Cleveland Program provides direct financial aid to sectarian schools, respondents are wrong both about the Cleveland Program itself and about the United States in general. As respondents apparently like to forget, in prior years the percentage of students attending non-religious schools, now four percent of the total, was 22 percent. The percentage dropped when Ohio enacted a community (*i.e.*, charter) school law, and because of the uncertainty engendered by the prior state court litigation instituted by these very same respondents, the founder of the two largest non-religious schools in the Program withdrew them from the Program and reopened them as community schools, where coincidentally they receive state funding at a per capita rate twice that of a scholarship in

the Program. Aff. of David Brennan (J.A. 144a). Experience in the very similar scholarship program in Milwaukee has been equally dynamic, but in the other direction. Although religious schools have comprised a majority of participating schools since 1995, the participation of non-religious schools and their proportion of scholarship students has steadily increased, particularly after litigation ceased. Decl. of Dr. Howard Fuller (J.A. 228a). Finally, respondents' unwarranted generalizations about U.S. averages conceal enormous variation among the states. As the chart on page 15 of the *amicus curiae* brief filed by the States of Florida, Alabama, Delaware, Nebraska, Pennsylvania, South Carolina, and Virginia shows, in seven out of 51 jurisdictions a majority of the private schools are non-religious[10] and in four more over 40 percent are non-religious.[11] Identical parental choice programs in those states would show a considerably larger participation of non-religious schools, underscoring this Court's wisdom in not hitching a program's constitutionality to the independent choices of third parties, whether students or schools.

Nor are respondents and the Sixth Circuit correct in viewing the structure of the Program as skewed in favor of religion. This whole argument rests on the idea, unsupported by any evidence in the record below, that the scholarship amount is set so low that it favors the participation of religious schools, because they can subsidize

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[10] Maine, the District of Columbia, Massachusetts, Rhode Island, Utah, Vermont, and New Hampshire.

[11] Colorado, New Mexico, California, and Connecticut.

their operations through donations from their congregations, which non-religious schools cannot.[12] This bald-faced assumption ignores the facts that non-religious schools also routinely seek donations and that the Program has led to the opening of a number of non-religious schools willing and able to operate on the scholarship amount.[13] In any event, the amount of the scholarship pales in comparison to public school subsidies, along with other disincentives to choosing private schools described in our opening brief, which render the Program not merely neutral with respect to religion but what we have characterized as "neutral-plus": *all* incentives operate to the advantage of public schools and their patrons.

Respondents also disparage the Ohio Legislature's efforts to promote the participation of neighboring school districts and to provide additional educational benefits to students who remain in the Cleveland public schools. The Simmons-Harris respondents (Br. at 30 n.11) at least concede that the Sixth Circuit wrongly believed that the neighboring school districts would only receive the $2,500 scholarship money if they agreed to take Cleveland children (they would in fact receive the scholarship plus their normal per capita state aid),[14] but make a new

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[12] The Cleveland Program is limited to Kindergarten through grade 8, where costs are considerably less than in high school.

[13] As noted previously, see p. 12, *infra*, the uncertainty spawned by this litigation and the creation of the community school program with its greater per capita payments have negatively affected the participation of non-religious schools.

[14] The Gatton respondents, on the other hand, persist in stating that the adjacent districts would only receive $2,250 per Program student, in their inaptly titled "Essentially Undisputed Facts" section. Br. at 2.

claim that because this $7,250 amount is far exceeded by the $9,000 average cost of education in the adjacent school districts there was and is no reasonable expectation that any district would participate to give additional public school options to the parents. Once again, respondents are using crude averages to obscure the fact that a number of adjacent districts' average cost of education is less than what they could receive for a Cleveland child,[15] especially since the averages all include the higher cost high school students.[16] In any event, the Program is equally non-compulsory regarding public and private school participation (even though the finances are more generous for public schools). The decision by schools to participate or not is not attributable to the State.

Respondents also insist that this Court should follow the Sixth Circuit in ignoring the other public school choices that Ohio has made available to the Cleveland families, especially community schools. Despite the direct and dramatic impact that the subsequent creation of the community school program had on the scholarship program, reducing the number of scholarship recipients in non-religious schools from 22 to four percent, respondents argue that the existence of this option, used by several thousand Cleveland families (including hundreds who used to be in the Scholarship Program), must be

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[15] For example, the Maple Heights district would receive nearly $2,000 more from the Program than their instructional cost per pupil, and East Cleveland would receive nearly $3,500. See www.ode.state.oh.us.

[16] The $9,000 average reflects the fact that several wealthy suburbs spend very large amounts per capita (for example, the Cuyahoga Heights district spends $14,572 per pupil on average, see *id.*).

ignored in determining whether the choices of the families to use a religious school are "genuinely independent." This approach ignores the reality that parents consider all their available options for their children, including their assigned school, magnet schools, community schools, and those available under the Scholarship Program.[17]

III. THE CLEVELAND PROGRAM DOES NOT VIOLATE THE HISTORICAL PURPOSES OF THE ESTABLISHMENT CLAUSE.

Contrary to the claims of the Gatton respondents, the historical development of the Establishment Clause does not require the invalidation of the Program. Both Jefferson's Bill for Religious Liberty and Madison's Memorial and Remonstrance Against Religious Assessments addressed taxes specifically levied to support churches, not statutes religiously-neutral on their face. Patrick Henry's proposed law at which the Memorial was

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[17] Contrary to Simmons-Harris respondents' assertions, the community schools are not "qualitatively different" from scholarship schools (Br. at 28), as witness the transition of non-religious scholarship schools into community schools. Both receive state "aid" only upon the choice of parents to send their children to them.

Respondents insist that because the community schools program is statutorially separate from the Scholarship Program it is irrelevant to the constitutionality of the Program. This is obviously absurd: if the Legislature had limited the community school program to Cleveland, instead of implementing it statewide, it could have made it an integral part of the Cleveland Program, rendering respondents' statistical arguments unavailing. Again, this demonstrates why this Court looks to the broader context in which the program exists and disdains snapshot statistical analysis.

directed proposed replacing Virginia's collection of taxes for the established Anglican Church with a system where Virginia would collect tithes for the churches of the taxpayers' denominations. See *Everson v. Board of Education*, 330 U.S. 1, 74 (1947) (appendix to dissent of Rutledge, J.). As such, it was on its face an effort to use the state as a tax collector for the various denominations. In contrast, Ohio has created a program that fulfills its obligation to provide a public education to its citizens by empowering some of its poorest citizens to purchase an education on the private market.[18] If Ohio's program offends the Establishment Clause, then so must an array of indistinguishable federal student-assistance programs.

IV. EXCLUDING RELIGIOUS SCHOOLS WOULD VIOLATE THE RELIGIOUS NEUTRALITY REQUIRED BY THE ESTABLISHMENT, FREE EXERCISE, FREE SPEECH, AND EQUAL PROTECTION CLAUSES.

We note that while the Scholarship Program is one of student assistance rather than one of direct support of private schools, there are circumstances where even programs of such direct support, if religiously neutral, would be constitutional. For example, while the federal

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[18] Shortly after the First Amendment was ratified, Congress organized the Northwest Territory from which several States, including Ohio, were later created. Following colonial practice, the Territory was divided into townships of uniform size, in which standard sections were set aside for the support of schools. At that time, of course, all the schools would be characterized as religious, yet no one, including Jefferson or Madison, challenged this direct support of religious schools and churches as inconsistent with the Establishment Clause. See *Rosenberger*, 515 U.S. at 858 (Thomas, J., concurring).

government is not in the business of building schools, it does aid in the rebuilding and reconstruction of schools through its disaster relief efforts. In doing so it treats religious schools the same as other private schools. See 42 U.S.C. 5172; 44 C.F.R. 206.221(e); FEMA Public Assistance Policy Reference Manual 9521.3 and App. A.[19] If the federal government can rebuild a religious school pursuant to a religiously-neutral program, Ohio should be able to fund the efforts of its poorest students to escape Cleveland's disastrous public schools pursuant to a religiously neutral program.

Just as it would be unconstitutional for the federal government to rebuild all but religious schools after a natural disaster, so, too, would it be unconstitutional for Ohio to have excluded religious schools from the choices of parents. Such discrimination would constitute a deliberate hindering of religion, by refusing to allow religious schools to compete on an equal basis with non-religious schools, and thus violate the *Lemon* test. *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 524 (1993). The exclusion would also violate the Free Speech, Free Exercise, and Equal Protection Clauses, because the singling out of the religious viewpoint would be unjustified by the Establishment Clause. *Rosenberger v. Rector*, 515 U.S. 819 (1995); *Columbia Union College v. Oliver*, 159 F.3d 151 (4th Cir. 1998), and after remand to the district court, 254 F.3d 496 (4th Cir. 2001). But this Court need not enter this constitutional thicket, because its decisions in this area

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[19] The only exclusion involving religious schools is that just as churches are not rebuilt with FEMA funds, school chapels are not either. 44 C.F.R. 206.221(e)(1).

have charted a course of neutrality.[20] It is precisely that course that the framers of the Scholarship Program followed.

CONCLUSION

Ohio, faced with an educational crisis of unprecedented proportions in its largest city, has embarked on an innovative reform effort that empowers its most vulnerable citizens by giving to them a choice that its more wealthy citizens exercise routinely: the power to choose a school that works for their children. The Scholarship Program is both neutral on its face and in its structure, and every student who attends a private school does so because of the genuine and independent decision of his or her parent. While relatively few non-religious schools currently participate in the Program, Ohio has also made available a variety of non-religious options through its community and magnet school programs. The Supreme Court of Ohio upheld the Program under the Establishment Clause,[21] and the participating families are very

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[20] The Gatton respondents dismiss the *Nyquist* court's reservation of the question of a neutral program, see *Nyquist*, 413 U.S. at 783-83 n.38, as a "glancing reference," Br. at 37, when in reality it signaled the principle upon which all subsequent decisions in this area rest.

[21] Contrary to the assertion of the Gatton respondents, Br. at 31 n.7, the Ohio Supreme Court's decision was *not dictum* – it reversed a contrary decision of the Ohio Court of Appeals finding a violation of the Establishment Clause while finding that a single severable provision did violate the Clause. That the court also voided the statute on a procedural ground under the Ohio Constitution, while carefully giving the legislature time to correct the defect before the decision took effect, does not render its decision on the merits of the Establishment Clause

satisfied with it.[22] Petitioners ask this Court not to sever the educational lifeline Ohio has thrown to these families, and urge it to reverse the decision of the Sixth Circuit below.

Respectfully submitted,

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any less binding or persuasive. Unlike the Sixth Circuit, it faithfully applied this court's precedents.

[22] See, *e. g.*, Indiana University, *Evaluation of the Cleveland Scholarship and Tutorial Grant Program (1996-99)* (6th Cir. J.A. 448) and Aff. of Kim Metcalf (J.A. 71a).